Hastings Law Journal

Volume 46 | Issue 1 Article 10

1-1994

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by
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Introduction

If an employee deliberately falsifies an employment application or engages in on-the-job misconduct that, if known by the employer, would subject the employee to immediate discharge, should the employee be permitted to recover in a subsequent lawsuit alleging job discrimination? With increasing frequency, employers are defending discrimination suits[1] by alleging résumé fraud or employee misconduct[2] discovered after an allegedly discriminatory employment decision. Discord among the federal circuits regarding the proper treatment of the "after-acquired evidence"[3] has produced inconsistent results at the district court level, both within those circuits that have

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1. Although the majority of cases discussed in this Note involve disparate treatment claims brought under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991) [hereinafter Title VII], the principles discussed herein are generally applicable to other federal antidiscrimination laws. *See* H.R. REP. No. 40, 102d Cong., 1st Sess., tit. II, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 696-97 ("A number of other laws banning discrimination . . . are modeled after, and have been interpreted in a manner consistent with, Title VII."). Specifically, Title VII prohibits employment discrimination based on sex, race, color, religion, or national origin. 42 U.S.C. § 2000e-2(a)(1) (1988). "Disparate treatment" has been defined by the Supreme Court as a situation in which "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

2. The terms "employee misconduct" or "misconduct" as used in this Note refer to any behavior on the part of the employee that provides the employer with legitimate grounds for termination. *See, e.g.*, Paglio v. Chagrin Valley Hunt Club Corp., No. 91-3983, 1992 WL 144674 (6th Cir. June 25, 1992) (misappropriation of employer funds for personal use); Bonger v. American Water Works, 789 F. Supp. 1102 (D. Colo. 1992) (removal of employer's confidential files); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988) (falsification of company records).

3. The Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have addressed the after-acquired evidence problem with conflicting results. *See* discussion *infra* Part II.

not yet addressed the issue[4] and in some instances even within those that have.[5] Although the Supreme Court has already indicated its willingness to resolve this rift,[6] the after-acquired evidence debate continues to divide the courts.

The majority of federal courts that have addressed this problem have sided with employers, holding that evidence of employee misconduct or deceit discovered subsequent to the challenged employment decision bars any recovery by the employee.[7] The majority view argues that although evidence discovered after termination is not relevant in determining the *cause* of the employee's discharge, it does defeat the *injury* claim, and thus precludes any relief.[8] Accordingly, an employer who is able to demonstrate that the employee would not have been hired, or would have been immediately terminated had the information been known, is entitled to judgment as a matter of law.[9] This approach prevents a person from fraudulently obtaining employ-

4. Within the Ninth Circuit, for instance, compare O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992) (granting summary judgment to employer) with Benitez v. Portland Gen. Elec., No. CV 91-864-PA, 1992 WL 278104, at *7 (D. Or. Mar. 31, 1992) (declining to grant employer's summary judgment motion "[i]n view of the absence of Ninth Circuit precedent, and the harshness of the result urged by defendant").

5. *Compare* Benson v. Quanex Corp., No. 90-CV-71996-DT, 1992 WL 63013 (E.D. Mich. Mar. 24, 1992) (barring recovery under Michigan Elliot-Larsen Civil Rights Act because of after-acquired evidence of employment application fraud) *with* Bazzi v. Western & S. Life Ins. Co., 808 F. Supp. 1306 (E.D. Mich. 1992) (allowing recovery of damages under Elliot-Larsen Act despite after-acquired evidence of employment application fraud), *rev'd*, 25 F.3d 1047 (6th Cir. 1994) (table). Before either of these cases was decided, the Sixth Circuit had already ruled that the after-acquired evidence doctrine was applicable to claims brought under Elliot-Larsen. Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992).

6. The Supreme Court granted certiorari in a Sixth Circuit case but later dismissed the appeal at the request of the parties. Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993). Recently, however, the Justices agreed to review another Sixth Circuit panel decision involving the after-acquired evidence defense. McKennon v. Nashville Banner Publishing Co., 9 F.3d 539 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994).

7. *See, e.g.*, McKennon v. Nashville Banner Publishing Co., 9 F.3d 539 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988); Rich v. Westland Printers, Inc., No. Civ. A. HAR 92-2475, 1993 WL 220453 (D. Md. June 9, 1993); Churchman v. Pinkerton's Inc., 756 F. Supp. 515 (D. Kan. 1991). Indeed, because the post-termination discovery of résumé fraud or employee misconduct is often so favorable to the employer, one commentary has suggested that obtaining material after-acquired evidence is "akin to winning the lottery." William S. Waldo & Rosemary A. Mahar, *Lost Cause and Found Defense: Using Evidence Discovered After an Employee's Discharge to Bar Discrimination Claims*, 9 LAB. L.J. 31, 32 n.1 (1993).

8. *Summers*, 864 F.2d at 708.

9. *Milligan-Jensen*, 975 F.2d at 304-05.

ment or engaging in misconduct worthy of discharge and later claiming injury as an "employee."[10]

However, a growing number of courts have forged a separate path and have rejected the use of after-acquired evidence of résumé fraud or employee misconduct to entirely preclude a plaintiff's right to relief.[11] This approach assumes that withholding all remedies from an aggrieved employee for reasons completely unrelated to the employer's discriminatory conduct is antithetical to the stated goals of the antidiscrimination laws.[12] This practice ignores the fact that "employees subjected to discriminatory discharge have indeed suffered an injury regardless of whether other legitimate reasons for discharge might have existed."[13] Rather than treating after-acquired evidence as a complete bar to recovery, the minority view considers the evidence only as a limitation on a successful plaintiff's remedies of reinstatement, promotion, hiring, or front pay.[14]

Both approaches to the after-acquired evidence problem possess some merit, yet neither solution effectively balances the interests at stake. On one hand, the majority approach is correct in asserting that no compensation should result from the deprivation of a job to which

10. *See, e.g.*, Dotson v. United States Postal Serv., 977 F.2d 976, 978 (6th Cir. 1992) (per curiam) (holding that plaintiff was "not entitled to . . . relief when he was not initially qualified for the position"), *cert. denied*, 113 S. Ct. 263 (1992). *See infra* Part II.A. for a discussion of the majority view.

11. The first major case to do so was Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *vacated and reh'g en banc granted*, No. 91-7406, 1994 WL 481439 (11th Cir. Sept. 6, 1994). More recently, the Third Circuit also rejected the use of after-acquired evidence to completely preclude relief in discrimination cases. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994).

12. *Wallace*, 968 F.2d at 1180-81. *See also* Jennifer Miyoko Follette, Comment, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH. L. REV. 651 (1993) (arguing that the use of after-acquired evidence as a complete defense under Title VII undermines the purpose of the statute).

13. Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 323 (D.N.J. 1993) (rejecting after-acquired evidence as a complete bar to recovery).

14. In addition, some courts allow after-acquired evidence of employee misconduct or résumé fraud to partially limit a successful plaintiff's award of back pay. *See, e.g.*, Kristufek v. Hussman Foodservice Co., 985 F.2d 364, 371 (7th Cir. 1993) (limiting back pay award to the period between the date of plaintiff's discharge and the date the evidence was discovered). Most courts adhering to the minority view give no effect to after-acquired evidence when calculating a back pay award. *See, e.g., Wallace*, 968 F.2d at 1182 (holding that back pay will be reduced only if the employer can demonstrate that, independent of the plaintiff's lawsuit, it would have discovered the information prior to the date of judgment). For an overview of the *Wallace* court's approach to the remedies issue, see Elizabeth Pryor Johnson, *After-Acquired Evidence of Employee Misconduct: Affirmative Defense or Limitation on Remedies?*, 67 FLA. B. J. 76 (1993). *See infra* Part II.B. for a general discussion of the minority approach.

the employee was not initially entitled.[15] However, courts following the minority view are equally correct in holding that employees who are discharged for discriminatory reasons have suffered legal harm from the disparate treatment, and deserve compensation for that injury.[16] A more sensible approach to the after-acquired evidence problem should occupy a middle ground between these two competing doctrines. Consistent with the majority approach, an employee who is guilty of on-the-job misconduct or résumé fraud should be denied the full spectrum of relief and should not recover job-related economic damages. However, it is inconsistent with the goals of the federal antidiscrimination laws to allow after-acquired evidence of an employee's wrongdoing to prevent that employee from proving at trial that the employer's decision was motivated by unlawful considerations. An employee who proves discrimination should not be barred from obtaining a remedy tailored to compensate for the harm caused by the employer's illegal discrimination. This Note focuses on the precise nature of the employee's remedy in this context.

In passing the Civil Rights Act of 1991,[17] Congress amended Title VII to impose liability on employers whenever discrimination plays a role in an employment decision, even though legitimate reasons may have also motivated the employer's decision.[18] This statutory provision for employer liability in these so called "mixed-motive" cases was intended to strengthen the already existing safeguards against intentional discrimination in employment practices.[19] However, Congress undercut these same safeguards by placing severe limitations on a plaintiff's recovery in situations in which an employer is able to demonstrate that it would have taken the same action in the absence of any discrimination.[20] More specifically, the new Title VII relief provisions provide for declaratory and injunctive relief as well as attorney's fees to prevailing plaintiffs in mixed-motive cases. These same plaintiffs may not, however, receive compensatory or punitive damages, back pay, or an order compelling reinstatement, hiring or

15. Redd v. Fisher Controls, 814 F. Supp. 547, 551 (W.D. Tex. 1992) (holding that summary judgment is proper "on the grounds that the employee/plaintiff could not have been injured by being discharged").

16. Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. at 322 ("It is problematic at best to say that there has been no injury in the face of proven illegal conduct.").

17. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

18. *Id.* § 107(a), 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-2(m) (Supp. IV 1992)).

19. *See* H.R. REP. NO. 40, 102d Cong., 1st Sess., tit. II, at 17 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 710 (holding employers liable in mixed-motive situation reaffirms "Title VII's twin objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination").

20. 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. III 1991).

promotion.[21] This newly restructured liability and enforcement scheme reflects a legislative compromise. While employers are no longer absolved of liability for their discriminatory decisions on grounds that an alternative justification exists, the law refuses to grant an employee the maximum recovery when that employee is otherwise not entitled to the job.

Because a mixed-motive case looks to the actual motivations of the employer at the time of the adverse employment decision, the temporal focus is different in cases involving after-acquired evidence.[22] Yet the competing interests are similar in both contexts. The pivotal inquiry remains: How should an employee's right to be free from invidious discrimination be balanced against the equitable notion that a dishonest employee is not otherwise deserving of relief? This Note argues that the basic relief framework created by the Civil Rights Act of 1991 for mixed-motive cases, together with added provisions for compensatory and punitive damages, should be applicable to cases involving after-acquired evidence. Part I of this Note provides a brief overview of the mixed-motive defense and discusses the changes wrought by the passage of the Civil Rights Act of 1991. Part II analyzes the existing approaches to the after-acquired evidence problem and highlights the principal differences between them. Part III criticizes the federal courts' treatment of after-acquired evidence, arguing that both the majority and minority views are too extreme in their application. Finally, Part IV of the Note sets forth a proposal rooted in the recent amendments to Title VII which effectively balances the employee's right to be free from unlawful acts of discrimination against both the employer's right to insist upon integrity in the work force and the equitable notion that a dishonest employee should not receive a windfall.

I. The Mixed-Motive Cases

A mixed-motive case is one in which an employer makes an adverse employment decision for an unlawful reason, such as race or gender discrimination, and for a legitimate reason not prohibited by law, such as poor work performance. When an affected employee can prove that a particular employment decision was motivated by a pro-

21. 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. III 1991). In disparate treatment cases *not* involving mixed-motives, the Civil Rights Act of 1991 expressly provides for compensatory and punitive damages to victorious plaintiffs. 42 U.S.C. § 1981a (Supp. III 1991). The unavailability of these damages for victorious mixed-motive plaintiffs is troubling because it fails to fully compensate a victim who proves discrimination. *See* Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921 (1993).

22. By contrast, after-acquired evidence cases look to what the employer would have done at some hypothetical point *before* the adverse employment decision, assuming it had known of the employee's wrongdoing.

hibited reason, the defendant employer may rebut the plaintiff's claim of injury by demonstrating that legitimate factors were also present at the time the adverse decision was made.[23] Unlike cases involving after-acquired evidence, the mixed-motive defense considers only the factors that were actually known and relied upon in making the challenged employment decision.[24] However, mixed-motive cases provide a useful analogy for resolving the after-acquired evidence problem because both situations involve balancing the right of an employee to be free from discrimination against other countervailing factors. Whereas mixed-motive cases seek to preserve the employer's freedom to base employment decisions on legitimate factors, after-acquired evidence cases must determine the effect of an employee's malfeasance on his or her right to recover for a discriminatory employment decision.

A. The *Mount Healthy* Causation Test

The mixed-motive analysis was first articulated by the Supreme Court in *Mount Healthy City School District Board of Education v. Doyle*.[25] In *Mount Healthy*, an untenured school teacher was discharged by the defendant school board for failing to handle professional matters with sufficient tact.[26] Specifically, the teacher disclosed to a local radio station the contents of a school memorandum regarding the adoption of a new dress code for teachers, which the radio station subsequently broadcast as a news item.[27] Additionally, the teacher made obscene gestures to two female students during an incident in the school cafeteria.[28] Upon learning the reasons for his discharge, the teacher filed suit, claiming that the school board's decision violated his rights under the First and Fourteenth Amendments. The district court concluded that the communication to the radio station was constitutionally protected conduct, and that it played a substantial role in the school board's decision to discharge the teacher.[29] The dis-

23. *See, e.g.*, Fields v. Clark Univ., 817 F.2d 931, 936 (1st Cir. 1987) (holding that the burden of showing non-discriminatory motive shifts to employer once plaintiff submits direct evidence of discrimination); Terbovitz v. Fiscal Court, 825 F.2d 111 (6th Cir. 1987) (same).

24. Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (Brennan, J., plurality opinion) ("An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision.").

25. 429 U.S. 274 (1977).

26. *Id.* at 283 n.1.

27. *Id.* at 282.

28. *Id.*

29. *Id.* at 283.

trict judge found the constitutional violation to be determinative on the issue of liability and ordered reinstatement with back pay.[30]

Although the Supreme Court agreed with the district court that the teacher's communication to the radio station was protected by the First and Fourteenth Amendments, it reversed on the ground that the plaintiff could nonetheless have been terminated for making the obscene gestures to the female students.[31] The Court disagreed with the causation test employed by the district judge, observing that a rule "which focuses solely on whether protected conduct played a part, 'substantial' or otherwise . . . could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[32] The Court announced a new causation rule for cases involving a mixture of legitimate and illegitimate motives: Where an employee demonstrates that an adverse employment decision was motivated *in part* by the employee's constitutionally protected conduct, the employer may avoid liability by showing that it would have reached the same decision in the absence of the protected activity.[33]

B. *Price Waterhouse* and Title VII Discrimination Cases

Circuit courts were divided on the application of the *Mount Healthy* "same decision" test to suits brought under Title VII until the Supreme Court reviewed the matter in *Price Waterhouse v. Hopkins*.[34] In *Price Waterhouse*, a senior manager who was denied a promotion to an accounting partnership sued her employer under Title VII, charg-

30. *Id.*

31. *Id.* at 287.

32. *Id.* at 285. The Court also noted that any constitutional right implicated by the adverse employment decision is "sufficiently vindicated if [the] employee is placed in *no worse a position* than if he had not engaged in the conduct." *Id.* at 285-86 (emphasis added).

33. *Id.* at 287. The case was subsequently remanded to the district court to determine whether the school board would indeed have terminated plaintiff without regard to the constitutionally protected conduct. *Id.* On remand, the district court concluded that the teacher would have been rightfully terminated for reasons independent of the radio communication. The Sixth Circuit affirmed. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 670 F.2d 59 (6th Cir. 1982).

34. 490 U.S. 228 (1989). Before *Price Waterhouse*, the circuit courts disagreed over the level of proof required of an employer to show that it would have made the same decision in the absence of a discriminatory animus. *Compare* Fields v. Clark Univ., 817 F.2d 931, 937 (1st Cir. 1987) ("[W]e think the test usually applied in civil cases — preponderance of the evidence — is the appropriate one.") *with* Day v. Mathews, 530 F.2d 1083, 1085 (D.C. Cir. 1976) (requiring clear and convincing evidence). An additional conflict existed with respect to the impact of a properly proven mixed-motive defense — specifically, whether the defense absolved the employer of liability, or whether it merely limited the employee's available remedy. *See Price Waterhouse*, 490 U.S. at 238 n.2.

ing gender discrimination.[35] The district court concluded that although the employer had legitimate non discriminatory reasons for denying the promotion, the decision was at least partially motivated by the employer's impermissible conceptions about the proper behavior of women.[36] On review, the Supreme Court held that when a plaintiff in a Title VII case proves that gender[37] played a role in an adverse employment decision, the burden of persuasion shifts to the employer to show by a preponderance of the evidence that it would have made the same decision irrespective of the proven discrimination.[38] By allowing an employer to avoid liability upon satisfying this burden,[39] *Price Waterhouse* extended the *Mount Healthy* "same decision" test and its corresponding evidentiary scheme to cases brought under the federal antidiscrimination statutes.[40]

The Supreme Court explained its adoption of the *Mount Healthy* rule by pointing to Title VII's goal of preserving the balance between "employee rights and employer prerogatives."[41] The Court observed that although Title VII was intended to eradicate all invidious consideration of race, color, religion, sex, or national origin in employment practices, the statute did not purport to impinge on an employer's freedom of choice to insist that employees possess the necessary qualifications for employment.[42] According to the Court, the balance of employee and employer rights is best served by a rule that allows an employer to avoid liability upon a showing that it would have made the same decision in the absence of a discriminatory animus.[43] Implicit in the Court's reasoning is the idea that allowing an employee to recover despite evidence of other legitimate factors supporting the decision unfairly tips the scales in the employee's favor.[44]

35. 490 U.S. at 232.

36. *Id.* at 236-37.

37. Although *Price Waterhouse* dealt specifically with gender-based discrimination, its reasoning applies with equal force to claims of discrimination based on race, color, religion or national origin. Indeed, the Court noted that Title VII "treats each of the enumerated categories exactly the same." *Id.* at 243-44 n.9.

38. *Id.* at 244-45.

39. Justice Brennan characterized the employer's burden in mixed-motive cases as an affirmative defense because "the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another." *Id.* at 246 (citing NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983)).

40. *See Price Waterhouse*, 490 U.S at 247 n.12.

41. *Id.* at 239.

42. *Id.*

43. *Id.* at 242 ("We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person.").

44. This is consistent with the Court's pronouncement in *Mount Healthy* that any right of the employee is "sufficiently vindicated if [the] employee is placed in no worse a position than if he had not engaged in the conduct." Mount Healthy City Sch. Dist. Bd. of

C. The Congressional Response: Redefining the Balance

In direct response to the Supreme Court's decision in *Price Waterhouse*, the Civil Rights Act of 1991[45] amended Title VII to impose liability on employers whenever an impermissible factor contributes to an employment decision.[46] Believing that *Price Waterhouse* "severely undermine[d] protections against intentional employment discrimination,"[47] Congress passed legislation eliminating an employer's ability to evade punishment for discriminatory employment decisions simply by articulating an alternate nondiscriminatory reason that also contributed to the decision. Section 107(a) of the 1991 Act provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice.*"[48] The relief provisions of the statute are now triggered once the aggrieved party proves the existence of *any* forbidden motive.

Although section 107(a) reflects a congressional purpose to bring all incidents of employment discrimination on the basis of race, sex, color, religion, or national origin under the protective wing of Title VII, Congress nevertheless believed that "a complaining party [should] receive relief only for the harm that actually results from the illegal discriminatory conduct."[49] Accordingly, under the 1991 Act, when an employer is able to establish that it would have reached the same adverse employment decision without regard to any impermissible criteria, the affected employee may not receive compensatory or punitive damages, back pay, or any prospective relief (including court-ordered hiring, reinstatement, or promotion).[50] By curtailing a successful plaintiff's award in a mixed-motive case, the 1991 Act attempts to redress only the injury actually attributable to the discrimination. That is, a remedy is provided for all intentional acts of discrimination,

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Educ. v. Doyle, 429 U.S. 274, 285-86 (1977). Disregarding the additional legitimate reasons underlying the challenged employment decision not only curtails the employer's prerogatives, but arguably places the employee in a better position than if no discrimination occurred, since the adverse decision would have been made even in the absence of any discrimination. *See Price Waterhouse*, 490 U.S. at 276-77 (O'Connor, J., concurring).

45. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.) [hereinafter the 1991 Act].

46. § 107(a), 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-2(m) (Supp. IV 1992)).

47. H.R. REP. No. 40, 102d Cong., 1st Sess., tit. II, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711.

48. § 107(a), 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-2(m) (Supp. IV 1992) (emphasis added).

49. H.R. REP. No. 40, 102d Cong., 1st Sess., tit. II, at 19 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 712.

50. 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (Supp. III 1991).

yet employees who would have been in the same adverse position in the absence of the discriminatory act cannot obtain a litigation windfall. The court may, however, order "other appropriate relief, including injunctive or declaratory relief" and attorney's fees for pursuing the claim.[51]

In creating this new liability and relief framework for mixed-motive cases, Congress redefined the balance between "employee rights and employer prerogatives."[52] Whereas the Court in *Price Waterhouse* held that these two considerations were adequately balanced by the *Mount Healthy* "same decision" test,[53] Congress believed that the *Mount Healthy* framework was inadequate to safeguard a person's right to be free from discrimination in their employment. Congress instead elected to hold employers liable for *all* discriminatory employment decisions, whether or not legitimate motives were also present.[54] At the same time, however, the 1991 Act was intended to preserve an employer's remaining freedom of choice in making employment decisions by precluding mixed-motive plaintiffs from attaining job-related remedies. By striking what was perceived to be a more satisfactory balance between employee rights and employer prerogatives, these statutory changes were designed to uphold "Title VII's twin objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination."[55] The new relief framework applicable to mixed-motive cases necessarily assumes that an employer will be sufficiently deterred from engaging in discriminatory employment practices by the specter of costly litigation and the resulting stigma should the plaintiff prevail. As to the second of Title VII's purposes, this enforcement scheme reflects a congressional policy decision that declaratory relief, injunctive relief (other than reinstatement, hiring, or promotion) and attorney's fees are sufficient to redress the injuries of plaintiffs who would have been in the same adverse position regardless of proven discrimination.[56]

51. 42 U.S.C. § 2000e-5(g)(2)(B)(i) (Supp. III 1991); H.R. REP. No. 40, 102d Cong., 1st Sess., tit. I, at 49 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 587. The Supreme Court recently held that the provisions of the 1991 Act, including the new relief provisions, are not retroactively applicable. *See* Landgraf v. USI Film Prods. 114 S. Ct. 1483 (1994) (finding the 1991 Act inapplicable to case pending on appeal when statute was passed).

52. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989).

53. *See supra* text accompanying note 33.

54. 42 U.S.C. § 2000e-2(m) (Supp. IV 1992).

55. H.R. REP. No. 40, 102d Cong., 1st Sess., tit. II, at 17 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 710.

56. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i) (Supp. III 1991). By enacting this provision, Congress appears to adopt the position taken by the Justice Department in *Price Waterhouse*. *See* Brief for the United States as Amicus Curiae at 24, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (No. 87-1167) (arguing that Title VII "should be construed to allow the defendant in a disparate treatment case to prove that, because the adverse em-

II. The After-Acquired Evidence Doctrine in Federal Court

Unlike mixed-motive cases, which involve the presence of both lawful and unlawful factors at the time of a challenged employment decision, after-acquired evidence cases address the effect of subsequently discovered information that presents an employer with a legitimate excuse for its adverse decision, *post facto*. To illustrate, suppose that a job applicant falsifies data on an employment application, misrepresents his or her qualifications on a résumé, or, after being hired, engages in misconduct that would justify immediate termination. Imagine also that the employer is unaware of this behavior until *after* it either refuses to hire or terminates the applicant or employee for alleged discriminatory reasons.[57] Should the employer be permitted to contest a discrimination claim on the ground that the applicant or employee has suffered no injury because he or she was not legally entitled to the job at the time the adverse decision was made? The circuit courts differ on this question: Those courts that have addressed the issue ally themselves with one of two primary positions. One approach, followed by the Fourth, Sixth, Eighth and Tenth Circuits, holds that after-acquired evidence, provided that it is material, operates as a complete bar to relief.[58] The other approach, followed by the Third, Seventh and Eleventh Circuits, does not allow after-acquired evidence to serve as a complete defense. Rather, these courts permit the evidence to function only as a partial limitation on a successful plaintiff's available remedies.[59]

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ployment decision would have been made in any event for legitimate, nondiscriminatory reasons, the plaintiff will be made whole by an award of attorney's fees and an injunction against future discrimination").

57. As this illustration suggests, there are three types of after-acquired evidence cases: (1) wrongful discharge suits involving post-hiring misconduct; (2) wrongful discharge suits involving pre-hiring misconduct, including résumé and application fraud; and (3) wrongful refusal to hire suits involving pre-hiring misconduct. *See* Gian Brown, *Employee Misconduct and the Affirmative Defense of "After-Acquired Evidence,"* 62 FORDHAM L. REV. 381, 382 (1993).

58. *See, e.g.*, Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994); McKennon v. Nashville Banner Publishing Co., 9 F.3d 539 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988); Smallwood v. United Air Lines, 728 F.2d 614 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984).

59. *See, e.g.*, Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994); Kristufek v. Hussmann Foodservice Co., 985 F.2d 364 (7th Cir. 1993); Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *vacated and reh'g en banc granted*, No. 91-7406, 1994 WL 481439 (11th Cir. Sept. 6, 1994). The panel decision in *Wallace* pioneered the minority approach. Although the Eleventh Circuit has since decided to reconsider the case *en banc*, the panel decision in *Wallace* is perhaps the best illustration of the reasoning behind this approach.

A. The Majority View: After-Acquired Evidence as a Complete Defense

The majority of courts that have confronted the after-acquired evidence dilemma find that such evidence negates the plaintiff's claim. With certain qualifications, these courts allow an employer to escape liability completely by showing that the employer either would not have hired or would have immediately fired the plaintiff had the evidence been known.[60] This approach recognizes that although after-acquired evidence is not probative of an employer's liability, it is relevant to the question of whether the plaintiff actually suffered an injury from the claimed violation.[61] Indeed, courts invoking the after-acquired evidence doctrine assume that an employer is liable and instead focus on the nature of the alleged injury.[62] Where no redressable injury exists because the plaintiff's misconduct preceded the adverse employment decision, the employer may obtain summary judgment regardless of whether it engaged in a discriminatory employment practice.[63]

(1) Tenth Circuit: Birth of the Doctrine

The genesis of the after-acquired evidence doctrine can be traced to the landmark case of *Summers v. State Farm Mutual Automobile Insurance Company*.[64] In *Summers*, the plaintiff, a claims representative for the defendant insurance company, filed suit against his employer alleging that he was unlawfully terminated because of his age and religion.[65] During pre-trial preparations, almost four years after the plaintiff's discharge, the defendants discovered that the plaintiff had falsified company records on over 150 occasions.[66] Based on this newly discovered evidence, the defendant filed a motion for summary judgment, asserting that, had it previously known of these falsifica-

60. There is some debate as to whether the "would not have hired" standard is applicable in wrongful discharge cases. *See infra* notes 80-86, 174-183 and accompanying text.

61. *See, e.g.*, McKennon v. Nashville Banner Publishing Co., 9 F.3d 539 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994).

62. O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1469 (D. Ariz. 1992) ("[L]iability of [the defendant] is not at issue. The after-acquired evidence . . . is relevant in determining whether [plaintiff] was injured by the assumed discrimination and is subject to a summary judgment motion."). When it is undisputed that the defendant employer would have made the same adverse decision if had it known of the after-acquired evidence, "it becomes irrelevant whether or not [the employee] was discriminated against." Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 305 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993).

63. *See* Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 415 (6th Cir. 1992) (holding that the after-acquired evidence entitles employer to summary judgment, even if the plaintiff can prove a violation of state civil rights statute).

64. 864 F.2d 700 (10th Cir. 1988).

65. *Id.* at 702.

66. *Id.* at 703.

tions, it would have immediately terminated the plaintiff.[67] Plaintiff's counsel argued that the evidence of misconduct was inadmissible because it was irrelevant to the claim of discrimination, and that, accordingly, the court should not consider the evidence in determining the availability of relief to the plaintiff.[68] The district court disagreed with the plaintiff's argument and granted the defendant's motion for summary judgment.

On appeal, the Tenth Circuit affirmed[69] the district court's grant of summary judgment, noting that "while such after-acquired evidence cannot be said to have been a 'cause' for Summers' discharge in 1982, it is relevant to Summers' claim of 'injury,' and does itself preclude the grant of any present relief or remedy . . . ."[70] Relying on the causation rule enunciated in *Mount Healthy*,[71] the *Summers* court concluded that even if the plaintiff's discharge was predicated upon impermissible considerations, he suffered no harm because the defendant could have taken the same action in the absence of any discrimination and would have terminated the plaintiff had it known of his misconduct:

> The present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor." In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better a position.[72]

This reasoning makes clear that an employer's motivation in reaching an adverse employment decision is irrelevant to the summary judgment calculus; the employer's motion is granted not because it is able to articulate a nondiscriminatory, legitimate business reason for its act, but rather because the plaintiff has not been injured by the adverse decision.[73]

a. Pre-Hiring Misconduct

In *O'Driscoll v. Hercules Inc.*,[74] the Tenth Circuit applied the *Summers* rule to a case involving pre-hiring misconduct. In *O'Driscoll*, the plaintiff sued her employer for age discrimination after being discharged from her job as a quality control inspector. During preparation for trial the employer discovered that the plaintiff had

67. *Id.* at 708.
68. *Id.* at 704.
69. *Id.*
70. *Id.* at 708.
71. *See supra* note 33 and accompanying text.
72. *Summers*, 864 F.2d at 708.
73. *Id.*
74. 12 F.3d 176 (10th Cir.), *petition for cert. filed*, 62 U.S.L.W. 3757 (U.S. Apr. 1, 1994) (No. 93-1728).

made several misrepresentations on her employment application forms. Specifically, on her employment application, the plaintiff understated her age by five years, falsely represented that she had never previously applied for a job with the defendant, and failed to disclose a previous employer.[75] The defendant also discovered that the plaintiff had misrepresented the age of her son in order to obtain dependent health care coverage for him through her employer's health plan.[76] The *O'Driscoll* court affirmed the district court's grant of summary judgment in favor of the defendant, finding that the after-acquired evidence of the plaintiff's misconduct precluded her from obtaining any relief due to her termination.[77] The court noted that under the rule established in *Summers*, three factors must coalesce in order for after-acquired evidence to bar relief in a wrongful discharge case: (1) the employer must have been unaware of the misconduct when the employee was discharged; (2) the misconduct must justify discharge; and (3) the employer must demonstrate that it would have discharged the employee had it known of the misconduct.[78] The court expressly rejected the plaintiff's argument that employee misconduct must be "serious and pervasive" for *Summers* to apply.[79] Although the seriousness and pervasiveness of the plaintiff's misconduct remains a factor under the second and third prongs of the *Summers* test, it is not a threshold requirement for application of the rule itself.

b. "Would Not Have Hired" and "Would Have Fired" Standards

Because the defendant in *O'Driscoll* successfully demonstrated that it would have discharged the plaintiff had it known of her misconduct, the court reserved judgment on the defendant's alternative argument that it also would not have hired the plaintiff had it known of the after-acquired evidence.[80] In light of *O'Driscoll*'s limited holding, and bearing in mind that *Summers* was a case involving only *post*-hiring misconduct, the issue of whether the "would not have hired" standard applies in a wrongful discharge suit has never been addressed by the Tenth Circuit. District courts within the Tenth Circuit are divided on the issue and seem to apply both the "would not have hired" and the

75. *Id.* at 177-78.

76. *Id.* at 178. Plaintiff also falsely represented that she had completed two quarters of study at a technical college and misrepresented her age, under penalty of law, on an official United States Government application form for access to confidential information. *Id.*

77. *Id.* at 180-81.

78. *Id.* at 179 (citing Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988)).

79. *Id.* at 179.

80. *Id.* at 181 n.3.

"would have fired" standards interchangeably without discussion.[81] In *Bonger v. American Water Works*,[82] the only case within the Tenth Circuit to actually discuss the issue of which standard would apply, the court noted that in wrongful discharge cases involving after-acquired evidence of pre-hiring misconduct, the "would not have hired" standard might be inapplicable.[83] Although the *Bonger* court concluded that the defendant employer would indeed have terminated the employee had it known of the pre-hiring misconduct, Judge Carrigan noted that this might not always be the case: "There are many situations, however, in which an employer would not discharge an employee if it subsequently discovered résumé fraud, although the employee would not have been hired absent that résumé fraud. In such situations, the employee indeed would suffer injury if discharged because of discrimination."[84] Specifically, if an employee has consistently performed outstanding work, or if the employer had invested a great deal of time training the employee, or if the circumstances surrounding the actual misrepresentation are particularly understandable, an employer may be hesitant to discharge the employee.[85] Although this question has yet to be resolved by the Tenth Circuit, the *Bonger* court's reasoning is persuasive and has been cited approvingly by other courts.[86]

81. *See, e.g.*, Van Deursen v. United States Tobacco Sales & Mktg. Co., 839 F. Supp. 760 (D. Colo. 1993) (granting summary judgment on both "would not have hired" and "would have fired" standards); DeVoe v. Medi-Dyn, Inc., 782 F. Supp. 546 (D. Kan. 1992) (denying employer's motion based on "would not have hired standard"); Bonger v. American Water Works, 789 F. Supp. 1102 (D. Colo. 1992) (rejecting "would not have hired" standard); Churchman v. Pinkerton's Inc., 756 F. Supp. 515 (D. Kan. 1991) (granting summary judgment on both standards).

The focus of the after-acquired evidence inquiry is obviously different in a wrongful refusal-to-hire case. Because the plaintiff in such a case was never hired, the "would have fired" standard has no application. Thus, in application-rejection cases, the "would not have hired" standard is the only meaningful benchmark. Although the Tenth Circuit has never specifically addressed the relevance of *Summers* to suits involving application-rejection, it has indicated that similar results would be obtained in both wrongful discharge and wrongful refusal-to-hire cases. *See* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d at 707 n.3 ("[W]e find no meaningful distinction between a case involving the rejection of an application and a case involving the discharge of an employee."). One district court within the Tenth Circuit has explicitly undertaken this extension of the rule and applied *Summers* to an application-rejection case. Punahele v. United Air Lines, Inc., 756 F. Supp. 487 (D. Colo. 1991).

82. 789 F. Supp. 1102 (D. Colo. 1992).

83. *Id.* at 1106.

84. *Id.* (footnote omitted).

85. *Id.* at 1106 n.4.

86. *See, e.g.*, Washington v. Lake County, Ill., 969 F.2d 250, 254 (7th Cir. 1992) (citing *Bonger* and rejecting the "would not have hired test" in résumé fraud case).

(2) Sixth Circuit

The Sixth Circuit is firmly in the *Summers* camp, having repeatedly upheld summary judgment in favor of employers based on after-acquired evidence of employee misconduct.[87] In *Johnson v. Honeywell Information Systems, Inc.*,[88] the Sixth Circuit applied the *Summers* causation analysis to a claim brought under Michigan's Elliot-Larsen Civil Rights Act.[89] The plaintiff in *Johnson* filed suit against her employer for breach of contract and for violations of the Elliot-Larsen Act after being terminated for allegedly unsatisfactory performance. During discovery, it was revealed that the plaintiff had falsified her employment application by exaggerating the extent of her education and her relevant work experience.[90] On appeal, the Sixth Circuit held that the plaintiff's numerous falsifications precluded the grant of any relief because the defendant had established that it would not have hired the plaintiff and that it would have terminated her had it become aware of these falsifications during her employment.[91] The *Johnson* court did not specify the rationale behind its decision, stating simply that "[w]e agree with the reasoning of the court in *Summers* and hold that on these facts, even if we assume that Honeywell discharged Johnson in retaliation for her opposition to violations of the Act, she is not entitled to relief."[92]

The Sixth Circuit refined its analysis in *Milligan-Jensen v. Michigan Technological University*,[93] a case that extended the use of after-

87. *See* Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 304 (6th Cir. 1992) ("This circuit . . . has committed itself to the *Summers* rule."), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993).

88. 955 F.2d 409 (6th Cir. 1992).

89. MICH. COMP. LAWS §§ 37.2101-.2804 (1985 & Supp. 1993). Although Michigan law was unsettled as to the application of the after-acquired evidence doctrine to claims brought under the Elliot-Larsen Act, the *Johnson* court "divine[d] what the Michigan high court would say if faced with the issue." Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 412 (6th Cir. 1992) (citing Janikowski v. Bendix Corp., 823 F.2d 945, 948 (6th Cir. 1987)). In interpreting state law, the *Johnson* court, noting that Elliot-Larsen mirrored Title VII and was intended to provide similar protections, applied the relevant federal law, namely *Summers*. *Johnson*, 955 F.2d at 415 n.1. *But see* Bazzi v. Western & S. Life Ins. Co., 808 F. Supp. 1306, 1310 (E.D. Mich. 1992) (refusing to apply after-acquired evidence doctrine to Elliot-Larsen claim because Michigan civil rights law is "more than a mere duplication of Title VII"), *rev'd*, 25 F.3d 1047 (6th Cir. 1994) (table).

90. Specifically, plaintiff claimed to possess a bachelor's degree when she actually had completed only four university classes; she also claimed to have been managing some properties in the year preceding her employment with the defendant when in fact she was unemployed and seeking work. *Johnson*, 955 F.2d at 411-12.

91. *Id.* at 415. The *Johnson* court thus employed both the "would not have hired" and "would have fired" standards. *See supra* notes 80-86 and accompanying text.

92. *Johnson*, 955 F.2d at 415.

93. 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993).

acquired evidence to a wrongful termination suit brought under Title VII. In *Milligan-Jensen*, the plaintiff, a public security officer for a university, filed suit against her employer for gender discrimination and retaliatory discharge.[94] In preparation for trial, the defendant discovered that the plaintiff had omitted a prior DUI conviction from her employment application.[95] At trial, the district court found that the plaintiff had indeed been discriminated against on account of her gender, yet the court also found that the plaintiff's omission, if discovered during the course of employment, would have resulted in her immediate discharge.[96] On the basis of these factual findings, the district judge entered judgment for the plaintiff but exercised the equitable power of the court and reduced her recovery by one-half.[97] The Sixth Circuit reversed on appeal, taking the occasion to clarify its holding in *Johnson*: "The crucial difference between the trial court's approach and that applied by this court in *Johnson* is that the trial court balanced the equities, whereas *Johnson* regards the problem as one of causation."[98] The Sixth Circuit thus embraces the theory, as did the Tenth Circuit in *Summers*, that because the employee would have been fired had the employer known of the after-discovered misconduct, the employee has not suffered any legal damage by being terminated and is thus barred from recovery.[99]

The Sixth Circuit took *Summers* one step further in *Dotson v. United States Postal Service*,[100] a handicap discrimination case. The court in *Dotson* upheld summary judgment in favor of the employer on the basis that the discharged employee's application fraud rendered him unqualified for the position. The *Dotson* court's rationale differs from *Summers* in that it does not use after-acquired evidence of misconduct to rebut plaintiff's claim of injury. Rather, the *Dotson* rule allows the after-acquired evidence to negate one element of the employee's prima facie case of discrimination — that the employee

94. *Id.* at 302-03.

95. *Id.* at 303.

96. *Id.* at 303-04.

97. *Id.* at 304.

98. *Id.*

99. *Id.* at 304-05. *See also* McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 542 (6th Cir. 1993) ("[W]e have firmly endorsed the principle that after-acquired evidence is a complete bar to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence."), *cert. granted*, 114 S. Ct. 2099 (1994). In *Milligan-Jensen*, the court specifically adopted both the "would not have hired" and "would have fired" standards. 975 F.2d at 304-05. The court did note that other decisions had expressed concern over the "would not have hired" standard in wrongful termination cases (*see supra* note 84), but skirted the issue in a footnote. *Id.* at 305 n.3.

100. 977 F.2d 976 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 263 (1992).

was otherwise "qualified for the position."[101] If a complaining party in a Title VII suit is unable to prove that he or she was initially qualified for the job, an employer will escape liability.[102] Thus, unlike the *Summers* approach, the *Dotson* court allows the use of after-acquired evidence in the qualification stage of the prima facie case. The rule in *Dotson* trumps employer liability by preventing the aggrieved party from even satisfying its initial burden of production.[103]

(3) Fourth Circuit

The Fourth Circuit has not directly addressed the use of after-acquired evidence in wrongful termination cases. However, in *Smallwood v. United Air Lines, Inc.*,[104] the court expressed its support for a *Summers*-type rule in a failure-to-hire case. The plaintiff in *Smallwood* sued United under the Age Discrimination in Employment Act[105] (ADEA) for refusing to process his flight officer applica-

101. *Id.* at 978. The complainant in a Title VII case carries the initial burden of establishing a prima facie case of discrimination. This may be done by showing (i) that the employee belongs to a protected class; (ii) that the employee applied *and was qualified for* a job for which the employer was seeking applicants; (iii) that, despite his or her *qualifications*, the employee was rejected; and (iv) that, after the employee's rejection, "the position remained open and the employer continued to seek applicants from persons of complainant's *qualifications*." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (emphasis added). Thus, in order to survive a motion for summary judgment (or a motion for judgment as a matter of law), the plaintiff must show, *inter alia*, that he or she was initially qualified for the position.

102. *Id.*

103. *Dotson*, 977 F.2d at 977-78 (finding that because "honesty and trustworthiness" were required for the position, plaintiff's application fraud rendered him unqualified). *Cf.* Mantolete v. Bolger, 767 F.2d 1416, 1424 (9th Cir. 1985) (holding that after-acquired evidence of plaintiff's medical condition was admissible to rebut plaintiff's prima facie case of qualification, but implying that it would not be admissible to justify the employer's decision). The practice of using after-acquired evidence to rebut the qualification element has been criticized because the evidence is used to highlight the employee's shortcomings rather than the employer's motive, whereas the *McDonnell Douglas* model requires courts to focus solely on the employer's motivations at this initial stage. *McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.") *See also* Cheryl Krause Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 181 (1993) (arguing that the purpose of the prima facie case is to create a rebuttable presumption of discrimination). However, in East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977), the Supreme Court seemed to express its support for just such a rule, at least in cases involving application rejection: "Even assuming, arguendo, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event." *Id.* at 404 n.9.

104. 728 F.2d 614 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984).

105. 29 U.S.C. §§ 621-634 (1988).

tion because he was 48 years of age.[106] At the time of plaintiff's application, United had a company-wide policy providing that flight officer applications would not be considered from persons over the age of 35.[107] However, after United denied the plaintiff's application based on the age restriction, it discovered that the plaintiff had been fired from his former job for defrauding his employer.[108] Based on this after-acquired evidence, United asserted that even if there had been no age discrimination, the plaintiff still would not have been hired.[109] The trial court disagreed with this position, stating that it was "'entitled to be and should be, skeptical of after-the-fact decisions as to what the defendant would have done had it known what it knows now.'"[110] Because the district judge believed that "'only those facts available to the defendant as of the time of the rejection of the plaintiff's application ought to be considered,'" judgment was entered in favor of the plaintiff.[111]

The Fourth Circuit reversed. According to the court, the refusal of the district judge to consider the evidence of plaintiff's fraud was completely contrary to the "same decision" test[112] set forth in *Mount Healthy*.[113] Recognizing that the purpose of a back pay award under the ADEA is to restore the plaintiff to the position he would have occupied but for the discrimination, the court held that United's after-acquired evidence was admissible to show that it would have made the same adverse hiring decision even in the absence of any age discrimination.[114] The court was not troubled by the fact that the evidence was unknown to United at the time the decision was made.[115] Noting that it had "found no authority which supports the district court's condemnation of what it characterizes as the 'after-the-fact rationale,'"[116] the Fourth Circuit analyzed the *Mount Healthy* line of cases and concluded that:

> [T]hese cases show . . . that the disqualification for employment and thus for back pay, based on a "recreating [of] the circumstances that would have existed but for the illegal discrimination" may be established *by evidence which had not been developed at the time the*

106. *Smallwood*, 728 F.2d at 615.
107. *Id.*
108. *Id.* at 620.
109. *Id.* at 615.
110. *Id.* at 616.
111. *Id.*
112. *See supra* note 33 and accompanying text.
113. *Id.* at 623 (citing Mount Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).
114. *Id.*
115. *Id.* (noting that "such evidence [is] to be weighed by the same standards as other [evidence].").
116. *Id.*

> *claimant was denied employment*, provided such evidence is proved at trial of the remedy issue.[117]

Thus, the Fourth Circuit embraces the use of after-acquired evidence in refusal-to-hire cases for the purpose of showing that an applicant would not have been hired regardless of any discriminatory animus. Moreover, based on the *Mount Healthy* causation test, such a showing mandates the entry of judgment in favor of the defendant.

District courts within the Fourth Circuit have recently extended the *Smallwood* court's reasoning to other types of cases involving résumé and application fraud. For example, in *Rich v. Westland Printers, Inc.*,[118] a Title VII gender discrimination case, the defendant moved for summary judgment on the plaintiff's wrongful discharge claim after discovering that the plaintiff had falsely represented her educational qualifications on her résumé. The district court granted the employer's motion on the basis of *Summers*, *Milligan-Jensen*, and *Johnson*.[119] Although recognizing the absence of clear Fourth Circuit precedent on the after-acquired evidence issue, the court found the *Summers* line of cases to be consistent with the Fourth Circuit's decision in *Smallwood*.[120]

In a similar case, *Russell v. Microdyne Corporation*,[121] the plaintiff filed suit against her employer for gender discrimination and retaliatory discharge in violation of Title VII.[122] Based on information gleaned during discovery that the plaintiff's application and résumé misrepresented her employment and salary history, the employer moved for summary judgment.[123] The district court granted the employer's motion, finding that sufficient evidence existed to show that the employee would have been terminated for having made the misrepresentations.[124] Citing *Smallwood* and *Mount Healthy*, the *Russell* court stated, "If an employee never would have been hired or would have been discharged due to fraudulent statements, no recovery is warranted, regardless of any alleged adverse employment actions against the plaintiff."[125]

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117. *Id.* at 624 (quoting Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097 (8th Cir. 1982), (emphasis added) (footnote omitted).

118. No. Civ. A. HAR 92-2475, 1993 WL 220453 (D. Md. June 9, 1993).

119. *Id.* at *5.

120. *Id.* ("It appears to the Court that the *Smallwood* decision is not inconsistent with those holdings, nor is it inconsistent with the reasoning on which they are based.").

121. 830 F. Supp. 305 (E.D. Va. 1993).

122. *Id.* at 306.

123. *Id.* at 306-07.

124. *Id.* at 308.

125. *Id.* at 307. *But see* Boyd v. Rubbermaid Commercial Prods., Inc., No. Civ. A. 91-0083-H, 1992 WL 404398 (W.D. Va. Dec. 11, 1992) (refusing to "bootstrap a waning area of Title VII case law [*Summers*] onto the remedial provisions of the Equal Pay Act").

(4) Eighth Circuit

The Eighth Circuit has also recently adopted the *Summers* rationale. In *Welch v. Liberty Machine Works, Inc.*,[126] a case involving claims for wrongful discharge under ERISA and the Missouri Human Rights Act, the plaintiff alleged that the defendant employer terminated him from a machinist position in order to avoid liability for medical expenses under an employee benefits plan.[127] Liberty, the employer, claimed that the plaintiff's discharge was due to a lack of available work.[128] During discovery in the case, the plaintiff disclosed for the first time that he had been employed as a machinist immediately prior to being hired by Liberty, and that he had been fired after only one month for "unsatisfactory performance."[129] After learning of the plaintiff's prior employment, Liberty filed a motion for summary judgment in which it argued that it would never have hired the plaintiff had it been aware at the time of the plaintiff's work history.[130] Alternatively, Liberty argued that it would have immediately fired the plaintiff once it learned of the omission, citing in support of this assertion its written policy that "any misstatement or omission of fact on [an employment] application shall be considered cause for dismissal."[131] Anticipating that the Eighth Circuit would adopt the *Summers* rule, the district court granted Liberty's motion for summary judgment.[132]

The Eighth Circuit agreed with the district court that after-acquired evidence of application fraud could bar recovery for discriminatory discharge, yet the court reversed on the ground that the employer had not met its evidentiary burden on the summary judgment motion.[133] Noting the split of authority on the after-acquired evidence issue, the court commented as follows:

> [W]e find that the *Summers* rule is the better rule. In the application fraud context, therefore, we find that after-acquired evidence of employee misrepresentation bars recovery for an unlawful dis-

126. 23 F.3d 1403 (8th Cir. 1994).

127. *Id.* at 1404.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1406. The *Welch* panel's decision to adopt the majority approach was sharply criticized by Judge Morris Sheppard Arnold in dissent. *Id.* at 1406 (Arnold, J., dissenting). Judge Arnold's views largely reflect those of the Eleventh Circuit panel decision in Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *vacated and reh'g en banc granted*, No. 91-7406, 1994 WL 481439 (11th Cir. Sept. 6, 1994). *See* Part II.B.1 *infra*.

> charge, if the employer establishes that it would not have hired the employee had it known of the misrepresentation.[134]

In spite of its holding on the *Summers* issue, the *Welch* court concluded that Liberty's proof, which consisted solely of a self-serving affidavit by its company president, was insufficient to meet its burden under Rule 56.[135] The court believed that Liberty, as the movant for summary judgment, bore a "substantial burden of establishing that the policy pre-dated the hiring and firing of the employee in question and that the policy constitute[d] more than mere contract or employment application boilerplate."[136] Here, the court noted that Liberty had not adduced any further evidence substantiating its policies and therefore was not entitled to summary judgment.[137]

The quantum-of-proof problem identified by the *Welch* court is a recurring one in after-acquired evidence cases. Specifically, the question is whether an employer is able to offer sufficient evidence to sustain its burden as a movant under Rule 56. Typically, an employer moving for summary judgment under the "would have fired" standard will rarely be able to produce the perfect piece of evidence to support its claim — namely, evidence that the employer had previously discovered an employee's application fraud and fired the employee on that ground.[138] Usually, as in *Welch*, an employer can offer only self-serving affidavits of management stating the company's unequivocal policy of terminating employees who commit application fraud. However, because *Welch* would seem to reject such evidence as satisfying the employer's burden in most instances,[139] the case leaves unanswered the question of what, if anything, an employer can do to

134. *Welch*, 23 F.3d at 1405. Note that the *Welch* court's holding relies exclusively on the "would not have hired" rationale, even though the case involved alleged wrongful discharge. Thus, despite the court's assertion that its decision "does not vitiate the 'would have fired' prong of the *Summers* rule," *id.* at 1405 n.2, the decision does demonstrate that the Eighth Circuit rejects the idea that "would have fired" is the only appropriate inquiry in a wrongful discharge case. *See* Bonger v. American Well Works, 789 F. Supp. 1102, 1106 n.4 (D. Colo. 1992) (rejecting the "would not have hired" standard in wrongful termination case); Washington v. Lake County, Ill., 969 F.2d 250, 254 (7th Cir. 1992) (same).

135. *Welch*, 23 F.3d at 1405-06. Rule 56 permits the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

136. *Welch*, 23 F.3d at 1405.

137. *Id.*

138. In one case, however, the employer was able to point to at least *three* instances in which employees were terminated for making false representations on their résumés or applications. Miller v. Beneficial Management Corp., 855 F. Supp 691, 706 (D.N.J. 1994).

139. The *Welch* court left open the possibility that such evidence could support a summary judgment motion on other facts: "We do not decide whether an undisputed employer affidavit could, in some circumstances, establish the requisite material fact of a particular employer's policy. Rather, we find merely that in this case, [the employer's] affidavit was not sufficient." *Welch*, 23 F.3d at 1406.

satisfy its "substantial burden."[140] As a practical matter, therefore, the district court's careful consideration of the proffered evidence on a Rule 56 motion may pose a significant and perhaps much-needed check on an employer's ability to obtain summary judgment in after-acquired evidence cases.[141]

B. The Minority View: After-Acquired Evidence as a Partial Limitation on Remedies

An increasing number of courts have rejected the reasoning of *Summers* and its progeny.[142] This minority approach refuses to allow after-acquired evidence to completely bar a complaining party's recovery and instead considers the evidence only as a partial limitation

140. *Id.* The court alternatively characterizes the movant's burden in this situation as "substantial" or "significant." *Id.*

141. Consistent with this idea, a few courts implicitly accepting the *Summers* rationale have nevertheless denied summary judgment because of a deficiency of proof under the Rule 56(c) standard. *See* Reed v. AMAX Coal Co., 971 F.2d 1295, 1298 (7th Cir. 1992) ("AMAX never proved that it would have fired Reed for lying on his application; it only proved that it could have done so. AMAX did not, for instance, provide proof that other employees were fired in similar circumstances."); Mackey v. Board of Pensions of the United Methodist Church, No. 91 C 5739, 1993 WL 11674, at *3 (N.D. Ill. Jan. 15, 1993) (finding the employer's self-serving affidavits insufficient to establish materiality "in view of the importance of this inquiry to the application of the after-acquired evidence doctrine").

These cases, however, represent the exception rather than the rule. The overwhelming majority of cases embracing *Summers* accept at face value the employer's affidavits and shift the burden to the employee to rebut the affidavits by contrary evidence. *See, e.g.*, Jackson v. Integra Inc., 30 F.3d 141 (unpublished disposition), 1994 WL 379305, at *2 (10th Cir. 1994) (burden shifted to plaintiff after employer submitted affidavit of manager); Davis v. Pyramid Prods., Inc., No. 93-CV-72174-DT, 1994 U.S. Dist. LEXIS 11761 (E.D. Mich. June 6, 1994) (same); Russell v. Microdyne Corp. 830 F. Supp. 305, 308 (E.D. Va. 1993) (boilerplate language in employment application "is persuasive evidence that the employer would terminate the employee"); Redd v. Fisher Controls, 814 F. Supp. 547, 552-53 (W.D. Tex. 1992) (similar boilerplate language "is specific enough for this Court to believe Plaintiff was adequately apprised of the potential result" of her application fraud); Baab v. AMR Servs. Corp., 811 F. Supp. 1246, 1259 (N.D. Ohio 1993) ("[E]stablishment of materiality will often be a matter of common logic, easily supportable by affidavit."). The relative ease with which employers have been able to meet their burden under Rule 56 renders suspect the assertion of counsel in one case that "[t]he circuits applying the [after-acquired evidence] doctrine to bar relief have articulated a high standard of proof that employers must meet on a motion for summary judgment to show that a discrimination plaintiff is entitled to no relief." Brief for Respondent at 17, McKennon v. Nashville Banner Publishing Co., No. 93-1543 (U.S. Sept. 8, 1994).

142. *See, e.g.*, Kristufek v. Hussman Foodservice Co., 985 F.2d 364 (7th Cir. 1993); Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *vacated and reh'g en banc granted*, No. 91-7406, 1994 WL 481439 (11th Cir. Sept. 6, 1994); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314 (D.N.J. 1993); Benitez v. Portland Gen. Elec., No. CV 91-864-PA, 1992 WL 278104 (D. Or. Mar. 31, 1992). *See also* E.E.O.C. v. Farmer Bros. Co., 31 F.3d 891, 901-02 (9th Cir. 1994) (rejecting after-acquired evidence defense in dicta).

on a prevailing plaintiff's available remedies.[143] According to these courts, using after-acquired evidence to preclude all available relief contravenes the legislative goals of Title VII.[144] Specifically, the minority view argues that the *Summers* rationale allows an employer, first, to benefit from information discovered only as a result of its discriminatory acts and, second, to escape liability for its unlawful employment decision by proffering a justification that did not motivate it at the moment the decision was made.[145]

(1) Eleventh Circuit

The Eleventh Circuit initiated the backlash against *Summers* in *Wallace v. Dunn Construction Company*,[146] the most pronounced departure to date from *Summers*. In *Wallace*, the plaintiff sued her employer under Title VII and the Equal Pay Act for sex-based discrimination, sexual harassment, and retaliatory discharge.[147] The employer learned in discovery that the plaintiff, in completing her employment application, had falsely denied ever having been convicted of a crime. Actually, the plaintiff had been convicted in Alabama of cocaine and marijuana possession prior to her application for employment with the defendant.[148] The employer moved for summary judgment on the basis of this after-acquired evidence, arguing that the plaintiff's prior convictions, as well as her misrepresentations regarding those convictions, "served as a legitimate cause for terminating [her] employment irrespective of any alleged illegal unlawful [sic] motives."[149] The district court denied the motion as a matter of law, rejecting the defendant's after-acquired evidence defense.[150]

On appeal, two judges of the Eleventh Circuit panel agreed with the district court's rejection of the *Summers* defense, but concluded that partial summary judgment was appropriate on the plaintiff's claims of reinstatement, front pay, and injunctive relief.[151] Criticizing

143. Although the courts adopting the minority view uniformly preclude reinstatement, promotion, hiring, or front pay, the approach varies with respect to the specific limitations imposed on a successful litigant's award of back pay. *Compare Wallace*, 968 F.2d at 1182 (limiting back pay award only if employer can show it would have discovered employee misconduct before end of back pay period) *with* Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 n.2 (7th Cir. 1989) (barring from eligibility employee for any back pay award after the fraud was discovered). *See infra* notes 165-169 and accompanying text.

144. *Wallace*, 968 F.2d at 1180.

145. Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 322-24 (D.N.J. 1993).

146. 968 F.2d 1174 (11th Cir. 1992), *vacated reh'g en banc granted*, No. 91-7406, 1994 WL 481439 (11th Cir. Sept. 6, 1994).

147. *Id.* at 1176.

148. *Id.* at 1176-77.

149. *Id.* at 1177.

150. *Id.*

151. *Id.* at 1184.

Summers as "antithetical to the principal purpose of Title VII," the *Wallace* court found that the after-acquired evidence could not affect the employee's potential awards of back pay, lost wages, or liquidated damages because those remedies were necessary to effectuate the "make whole" purposes of the statute.[152] According to the court, a rule that permits evidence discovered after the fact to defeat these remedial awards would place the plaintiff "in a worse position than if she had not been a member of a protected class or engaged in protected conduct."[153] Consistent with this notion, the court refused to end the back pay period on the date that the employer discovered the fraud, reasoning that such an approach "would have the perverse effect of providing a windfall to employers who, in the absence of their unlawful act and the ensuing litigation, would never have discovered any after-acquired evidence."[154] In order to limit a back pay award, an employer must demonstrate that, notwithstanding its unlawful acts and the resulting litigation, it would have discovered the evidence sometime prior to what would otherwise have been the end of the back pay period.[155]

The *Wallace* court's approach does incorporate one critical aspect of *Summers* — namely, that after-acquired evidence is relevant in calculating the relief to be awarded a successful Title VII plaintiff. Indeed, the *Wallace* court acknowledged that "[a] sufficient showing of after-acquired evidence mandates the drawing of a boundary between the preservation of the employer's lawful prerogatives and the restoration of the discrimination victim."[156] However, the dividing line drawn by the *Wallace* court differs dramatically from *Summers*. Whereas the Tenth Circuit in *Summers* implicitly held that after-the-fact rationales may be included in considering what actions an employer may permissibly take, *Wallace* finds such rationales to be separate and distinct from an employer's lawful prerogatives because they were not present at the moment the adverse employment decision was made.

The effect of *Wallace* on refusal to hire cases brought under the federal antidiscrimination statutes is not clear. In *Puhy v. Delta Air Lines, Inc.*,[157] the district court found that *Wallace* imposed no bar on the use of after-acquired evidence in a refusal-to-hire case brought under the ADEA. According to the *Puhy* court, the principal concern

152. *Id.* at 1180-83.

153. *Id.* at 1180.

154. *Id.* at 1182.

155. *Id.* One commentator has noted that this rule establishes "a virtually insurmountable evidentiary hurdle for employers to overcome in halting the backpay period." Johnson, *supra* note 14, at 77.

156. *Wallace*, 968 F.2d at 1181.

157. 833 F. Supp. 1577 (N.D. Ga. 1993).

of the *Wallace* opinion was to prevent the use of after-acquired evidence to place the plaintiff in a worse position than if she had not been a member of the protected class.[158] Thus, allowing after-acquired evidence to negate the plaintiff's claim in a *Wallace*-type wrongful discharge case would cause the employer's discrimination to place the plaintiff in a worse position at law — that is, the plaintiff who was previously employed would, as a result of evidence discovered in the ensuing litigation, be jobless and without a remedy.[159] However, in an application rejection case, in which the plaintiff is jobless to begin with, the use of after-acquired evidence does not have this detrimental effect.[160] The *Puhy* court held that subsequent evidence is admissible to show that the complaining applicant was not injured because he or she would not have been hired even in the absence of discrimination.[161]

The *Puhy* court found support for its position in *Wallace*, because the court appeared to draw a distinction between refusal-to-hire cases and wrongful discharge cases: "no injuries to the plaintiffs [are] possible [in refusal to hire cases] because, in fact, they never would have been hired even absent the discriminatory motive."[162] Yet, although the *Puhy* court's reasoning seems to be consistent with the idea expressed in *Wallace* that Title VII plaintiffs not be placed in a worse position by the employer's conduct, this reasoning nonetheless cuts against the idea, also expressed in *Wallace*, that employers be encouraged to eliminate discrimination in employment.[163] Because the rule articulated in *Puhy* would allow after-acquired evidence to cut off a complaining party's available relief in a refusal-to-hire case, it does not, under the logic employed in *Wallace*, deter employers from engaging in discriminatory hiring practices. The rule thus appears to draw an arbitrary distinction between refusal-to-hire cases and wrongful discharge cases based solely on the fact that wrongful discharge plaintiffs have more to lose.[164]

158. *Id.* at 1582 (citing Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1179 (11th Cir. 1992) *vacated reh'g en banc granted*, No. 91-7406, 1994 WL 481439 (11th Cir. Sept. 6, 1994)).

159. *Id.*

160. *Id.*

161. Despite this holding, the court denied the employer's motion for summary judgment on other grounds. *See id.* at 1582-86.

162. *Wallace*, 968 F.2d at 1179 n.8.

163. *Id.* at 1180.

164. *Cf.* Russell v. Microdyne Corp., 830 F. Supp. 305, 308 (E.D. Va. 1993) (finding that the harm caused by discriminatory failure to promote is "far less severe" than that caused by discriminatory discharge).

(2) Seventh Circuit

Although the Seventh Circuit has also repudiated the *Summers* rule, it takes a less altruistic approach with respect to a successful plaintiff's back pay award. In *Smith v. General Scanning, Inc.*,[165] a wrongful discharge case brought under the ADEA, the employer moved for summary judgment based on its post-termination discovery of the plaintiff's résumé falsifications. The Seventh Circuit explicitly rejected the employer's after-the-fact rationale, observing that whether the plaintiff was discriminated against "must be decided solely with respect to the reason given for his discharge . . . . His résumé fraud is, for this purpose, irrelevant."[166] However, the *Smith* court noted that the after-acquired evidence of the plaintiff's fraud "would be highly relevant" to the issue of appropriate relief if the defendant were found liable on the discrimination charge.[167] In such a case, the plaintiff would not be eligible for reinstatement, nor could he obtain any back pay for the period after the fraud was discovered.[168]

Thus, to the extent that it rejects the after-the-fact rationale as an absolute bar to relief, the Seventh Circuit's approach is consonant with the reasoning of the Eleventh Circuit panel in *Wallace*. The two approaches differ, however, with respect to the amount of relief available to an otherwise prevailing plaintiff. Whereas both the *Wallace* panel opinion and the Seventh Circuit deny reinstatement or promotion in the face of an employer's after-acquired evidence, the Seventh Circuit takes a different approach on the issue of back pay — it limits the plaintiff's award to the time between the discharge and the discovery of the fraud.[169]

Despite the language of *Smith*, the Seventh Circuit seemed to waver in its commitment to the minority approach in a subsequent case involving application fraud. In *Reed v. AMAX Coal Co.*,[170] the Seventh Circuit flatly rejected AMAX's after-acquired evidence defense. However, the court did not disapprove of the defendant's position on the grounds that the *Summers* rationale was invalid, but rather because the employer had failed to meet its evidentiary burden under the *Summers* rule.[171] Although the *Reed* court could have resolved the application fraud issue simply by referring to its decision in *Smith*,

165. 876 F.2d 1315 (7th Cir. 1989).

166. *Id.* at 1319.

167. *Id.* at 1319 n.2 (citing Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 704-05, 708 (10th Cir. 1988)).

168. *Id.*

169. *See* Washington v. Lake County, Ill., 969 F.2d 250, 253 n.2 (7th Cir. 1992) ("*Smith* implies that the plaintiff, if he otherwise proves his case, is entitled to backpay accumulation between the time of discharge and the time the fraud is discovered.").

170. 971 F.2d 1295 (7th Cir. 1992).

171. *Id.* at 1298.

it chose instead to distinguish the facts from *Summers*, finding that AMAX had proven only that it *could* have terminated the plaintiff for his misstatements, and not that it would have actually done so.[172] In so doing, the court implied that an employer could completely avoid liability under Title VII by proffering evidence which, although discovered subsequent to the challenged employment decision, would have resulted in immediate discharge if known:

> We must require similar proof to prevent employers from avoiding Title VII liability by pointing to minor rule violations which may technically subject the employee to dismissal but would not, in fact, result in discharge.
>
> Unlike the employer in *Summers*, AMAX never proved that it would have fired Reed for lying on his application; it only proved that it could have done so.[173]

In addition to its implicit adoption of the majority view in *Reed*, the Seventh Circuit has also upheld summary judgment in favor of an employer on the basis of after-acquired evidence. In *Washington v. Lake County, Illinois*,[174] Washington was terminated from his position as a jailer and later brought suit under Title VII, alleging that his discharge was motivated by racial considerations. During discovery, the employer learned that Washington had concealed information regarding his criminal record when completing his employment application.[175] The employer argued that summary judgment was appropriate because Washington either would not have been hired had his criminal convictions been known, or would have been fired upon the subsequent discovery of his falsehoods.[176] The appellate court agreed that no genuine issue of fact existed as to whether the employer would have fired Washington, but the court rejected the employer's alternate "would not have hired" argument.[177] Drawing an analogy to the "same decision" test set forth in the mixed-motive cases,[178] the *Washington* court held that the temporal focus of the litigation should govern the appropriate standard to be employed — either "would not have hired" or "would have fired."[179] Accordingly, in a wrongful discharge suit, the proper question would be whether

172. *Id.*
173. *Id.*
174. 969 F.2d 250 (7th Cir. 1992).
175. *Id.* at 251.
176. *Id.* at 253-56.
177. *Id.* at 256.
178. *See supra* text accompanying note 33.
179. *Id.* at 255-56. The court also noted that this approach would reduce an employer's incentive to scour through an employee's files in the hope of finding "'minor, trivial or technical infractions' on an employee's application or résumé." *Id.* (quoting O'Driscoll v. Hercules, Inc., 745 F. Supp. 656, 659 (D. Utah 1990), *aff'd*, 12 F.3d 176 (10th Cir.) *petition for cert. filed*, 62 U.S.L.W. 3757 (U.S. Apr. 1, 1994) (No. 93-1728)).

the employee would have been terminated; similarly, in a wrongful refusal-to-hire case, the appropriate issue would be whether the plaintiff would have been hired in light of the after-acquired evidence.[180] In support of this rule, the Seventh Circuit agreed with the decision in *Bonger v. American Water Works*[181] that in certain situations, a critical distinction exists between the "would not have hired" and the "would have fired" standards.[182] More specifically, an employer may refuse to hire an applicant if the employer knows at the time of the applicant's résumé fraud. However, once the applicant is hired, the employer may be very reluctant to fire the individual on the basis of a transgression which, in retrospect, may seem trivial or insignificant.[183]

Despite its ruling in favor of the employer, the *Washington* court did not embrace the majority approach. Indeed, the court noted that it was deciding the after-acquired evidence issue only because the plaintiff had failed to challenge the validity of the doctrine.[184] Although it made reference to its earlier decision in *Smith*, the *Washington* court did not consider whether the plaintiff had a right to back pay under the reasoning of that case because the issue was not raised on appeal.[185] Thus, the Seventh Circuit's support of summary judgment in *Washington* should not be read as an adoption of the majority approach because the court was required to decide the *Summers* issue before it.

The Seventh Circuit's commitment to the minority approach was ultimately reaffirmed in *Kristufek v. Hussmann Foodservice Co.*[186] The court here returned to the rule it set forth in *Smith* that a "discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge."[187] Accordingly, the *Kristufek* court found the after-acquired evidence of the plaintiff's résumé fraud irrelevant to the issue of liability, stating that "the deterring statutory penalty is for retaliatory firing, the character of which is not changed by some after discovered alternate reason for discharge which might otherwise have been used, but was not."[188] The court concluded that the defendant's subsequent evidence was relevant only to the damages

180. *Washington*, 969 F.2d at 255-56 & n.5. The court stated that generally, "the hypothetical inquiry should correspond to the time of the allegedly discriminatory employment decision." *Id.* at 256 n.5.

181. 789 F. Supp. 1102 (D. Colo. 1992). *See supra* text accompanying notes 81-86.

182. *Washington*, 969 F.2d at 255 n.5.

183. *See supra* text accompanying note 85.

184. *Id.* at 253 ("Although this court has never squarely adopted the *Summers* rationale, Washington does not challenge its validity.").

185. *Id.* at 253 n.2.

186. 985 F.2d 364 (7th Cir. 1993).

187. *Id.* at 369 (citing Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 (7th Cir. 1989)).

188. *Id.*

calculus and ordered the back pay award reduced, as per *Smith*, so as to not include the time after the fraud was discovered.[189] In refusing to allow an employer to escape sanction completely by asserting an after the fact rationale, the Seventh Circuit's latest pronouncement on the *Summers* doctrine places the court squarely within the minority camp. The only wrinkle in the Seventh Circuit's approach is that an employer may reduce its back pay liability to the period *before* it discovered the employee's misconduct or fraud, whereas the approach of the Eleventh Circuit *Wallace* panel is to award back pay until the date of judgment.

(3) Third Circuit

The Third Circuit has also recently decided a case involving the after-acquired evidence defense. In *Mardell v. Harleysville Life Insurance Company*,[190] the court resolved a conflict among the district courts within the Third Circuit by expressly repudiating the *Summers* rationale and instead aligning itself with the approach of the Eleventh Circuit *Wallace* panel.[191] The plaintiff in *Mardell*, a 52-year-old woman, was terminated from her position as Branch Manager for what the company alleged was poor work performance.[192] After learning that the employer had filled her position with a younger male, the plaintiff brought suit for gender and age discrimination under Title VII and the ADEA.[193] However, following the employer's post-termination discovery of the plaintiff's résumé fraud, the district court granted summary judgment for the employer.[194] The Third Circuit reversed.[195]

In its detailed opinion, the *Mardell* court carefully examined the arguments advanced in favor of the *Summers* rule, yet found them all to be inconsistent with the "plain meaning" of Title VII and the ADEA.[196] Among other things, the court found untenable the notion

189. *Id.* at 371.

190. 31 F.3d 1221 (3d Cir. 1994).

191. Prior to *Mardell*, district courts within the Third Circuit were divided on the application of the after-acquired evidence doctrine. *Compare* Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 322 (D.N.J. 1993) (denying summary judgment and adopting minority approach) *with* Miller v. Beneficial Management Corp., 855 F. Supp. 691 (D.N.J. 1994) (adopting *Summers* rule).

192. *Mardell*, 31 F.3d at 1222-23.

193. *Id.*

194. *Id.* at 1222. During discovery, the employer learned that the plaintiff had grossly overstated her employment experience and had falsely represented that she had a college degree. *Id.* at 1223-24. The employer moved for summary judgment based on this evidence, claiming that the plaintiff would have been terminated immediately upon discovery of the falsifications. *Id.* at 1224.

195. *Id.* at 1222.

196. *Id.* at 1231.

that a plaintiff suffers no injury from invidious discrimination simply because material evidence of misconduct is subsequently discovered by the employer.[197] According to the court, such reasoning operates "to deprecate the federal right transgressed and to heap insult ('[y]ou had it coming') upon injury. A victim of discrimination suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw."[198] The court thus concluded that even wrongdoers have a right to recover for discriminatory treatment on the job.[199]

Consistent with this view, the Third Circuit held in *Mardell* that after-acquired evidence of employee misconduct is inadmissible at the liability stage of a Title VII proceeding because such evidence is wholly irrelevant to the determination of employer liability.[200] The court agreed, however, that after-acquired evidence could be relevant at the remedies stage of the proceedings.[201] Specifically, such evidence could operate to bar an equitable remedy such as reinstatement which, in the context of balancing employee and employer rights, "would be particularly invasive of the employer's 'traditional management prerogatives'. . . ."[202] With respect to the back pay remedy, the Third Circuit adopted the approach of the *Wallace* panel: an employer is liable for back pay up until the moment of judgment, unless it can demonstrate that it would have discovered the evidence at an earlier point.[203] In adopting this rule, the court criticized the Seventh Circuit's approach in *Kristufek* [204] — which ends the back pay period at the moment the employer actually obtains the after-acquired evidence — as inconsistent with the deterrent and remedial goals of Title VII.[205]

(4) Equal Employment Opportunity Commission

As the government body charged with enforcing the policies of Title VII, the Equal Employment Opportunity Commission[206] (EEOC) has also provided official recommendations for the treatment of after-acquired evidence. Initially, the EEOC adopted a variation of

197. *Id.*
198. *Id.* at 1232 (citation omitted).
199. *Id.* at 1233.
200. *Id.* at 1238 (after-acquired evidence "may not be introduced substantively for the purpose of defending against liability").
201. *Id.*
202. *Id.* at 1240.
203. *Id.* at 1239-40.
204. *See supra* text accompanying note 189.
205. *Mardell*, 31 F.3d at 1239.
206. The EEOC was vested with civil enforcement powers under Title VII by the 1972 Equal Opportunity Act. Pub. L. No. 92-261, § 4(a), 86 Stat. 103, 104 (codified as amended at 42 U.S.C. § 2000e-5(f) (1988)).

the majority approach.[207] Citing *Summers*, the EEOC agreed that after-acquired evidence of employee misconduct could bar reinstatement and back pay, but stated that the employee would still be entitled to attorney's fees.[208] However, in an Enforcement Guidance issued in 1992, the EEOC reversed its position and recommended that after-acquired evidence be used to preclude reinstatement, but not back pay.[209] The 1992 Enforcement Guidance also adopted the Seventh Circuit's position on the calculation of the back pay award, recommending that the plaintiff's award be limited to the period between the discriminatory firing and the date the employer learned of the plaintiff's misconduct.[210] Despite these official pronouncements, the EEOC's position has been roundly criticized both for going too far in preserving an employee's right to relief,[211] and also for not going far enough in that direction.[212] Accordingly, the EEOC's recommendations will have little practical effect on the resolution of the after-acquired evidence problem.[213]

III. Going to Extremes: Shortcomings in the Current Treatment of After-acquired Evidence

Any proposed resolution of the after-acquired evidence problem must remain consistent with Title VII's dual objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination.[214] Nevertheless, in effectuating these twin goals, the ideal solution should not lose sight of their inherent limits — an employee who has suffered discrimination should be afforded a remedy, but should not be granted an undeserved wind-

207. *See* Equal Employment Opportunity Comm'n, Policy Guidance No. N-915.063, 1991 WL 70108 at *8 (Mar. 7, 1991).

208. *Id.* The EEOC Policy Guidance also stated that an employee in this situation would be entitled to injunctive relief, but only to prevent the employer "from discriminating in a similar fashion in the future." *Id.* at *8-9.

209. Equal Employment Opportunity Comm'n, Revised Enforcement Guidance No. 915-002, 1992 WL 189088, at *8 (July 14, 1992).

210. *Id.*

211. *See* Russell v. Microdyne Corp., 830 F. Supp. 305, 308 (E.D. Va. 1993). The *Russell* court found that the EEOC's position was "not entitled to any deference" because it was not an official agency guideline. *Id.* Moreover, the court noted that even EEOC guidelines lack the persuasive effect of agency rules, because the latter have been subjected to notice and comment. *Id.*

212. *See* Zemelman, *supra* note 103, at 204-05 (stating that the EEOC guidelines "should garner little weight" because they are poorly reasoned, conclusory, and inconsistent with the agency's earlier recommendations).

213. *Id.* at 204 ("[T]he EEOC recommendations will simply add to the debate among the circuits.").

214. *See supra* note 19.

fall.[215] The majority and minority approaches to the after-acquired evidence problem both fail to abide by these principles. First, by precluding all relief to a complaining party despite an employer's discriminatory conduct, the majority approach does not deter discrimination; nor does it make a victim whole. By the same token, the minority view's generous approach to the problem provides a windfall to an employee who is otherwise undeserving of relief — that is, it provides a remedy not only for the employer's discrimination, but also for the loss of a job to which the employee was not entitled.

A. Deficiencies in the Majority Approach

The majority approach, born out of *Summers*, is unsound for the simple reason that it misapplies the "same decision" test set forth in *Mount Healthy*.[216] This test, as the name implies, requires an employer to show that it would have made the same adverse employment decision in the absence of a forbidden discriminatory motive.[217] An employer cannot, therefore, make such a showing by relying on information that was not known to it "at the time of the decision."[218] This type of *post hoc* rationalization would undermine Title VII by allowing an employer to justify a proven discriminatory employment decision with reasons both unrelated to the decision and unknown to the employer at the time the decision was made.[219] To the extent that *Summers* and its progeny rest on this erroneous assumption, they are incorrect.

The majority approach also neglects the twin aims of Title VII because it does not encourage employers to eliminate discriminatory employment practices and because it fails to provide a remedy in the face of proven discrimination. Employers are not sufficiently deterred from engaging in discriminatory conduct under a rule that allows them to escape liability completely by scouring a complaining employee's record for the perfect *ex post facto* justification.[220] Title VII contem-

215. *Cf.* Cline v. Roadway Express, Inc., 689 F.2d 481, 490 (4th Cir. 1982) ("The ordering equitable principle is that a compensatory back-pay award should only make the wrongly discharged employee monetarily whole . . . it should not provide a windfall.").

216. *See supra* text accompanying note 33.

217. Mount Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

218. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989). *See also supra* note 24 and accompanying text.

219. *See* Mardell v. Harleysville Life Ins. Co, 31 F.3d 1221, 1228 (3d Cir. 1994) ("What sets an after-acquired evidence case far apart from a mixed-motives case . . . is that the articulated 'legitimate' reason, which was non-existent at the time of the adverse decision, could not possibly have motivated the employer to the slightest degree.").

220. *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1180 (11th Cir. 1992) ("The *Summers* rule does not encourage employers to eliminate discrimination. Rather, it invites employers to establish ludicrously low thresholds for 'legitimate' termination and to devote fewer resources to preventing discrimination because *Summers* gives them the option to

plates a much more exacting deterrent function, regardless of an employee's own dishonesty or turpitude.[221] As for the remedial purpose of the statute, the majority approach improperly precludes all relief despite the existence of proven discrimination. Title VII was enacted to eradicate discrimination in employment: To that noble end, when a complaining party is able to demonstrate that she was an actual victim of discrimination, courts should not withhold relief that is carefully tailored to remedy that particular evil.[222] The majority approach is accurate in asserting that an employee who has no right to a job because of misconduct or résumé fraud is not legally harmed by the subsequent deprivation of *employment.* However, the majority view's wholesale preclusion of relief overlooks the fact that the employee has nevertheless been harmed by the *discrimination.* The *Summers* rule is thus too rigid in its causation analysis. Although an appropriate rule needs to guard against an unwarranted windfall, it must also account for the evils of an employer's discriminatory conduct.

B. Deficiencies in the Minority Approach

The minority approach is similarly flawed in that its relief framework goes beyond the dual objectives of Title VII and fails to adequately account for the aggrieved employee's dishonesty. By providing a compensatory award to employees who have either used illegitimate means to obtain employment or have behaved improperly in the course of that employment, the minority approach in effect grants the employee an undeserved windfall. Title VII's remedial goal is "sufficiently vindicated" if a discriminatee is placed in no worse a position than he or she would have occupied in the absence of discrimination.[223] The minority view argues that the use of after-acquired evidence to defeat a successful plaintiff's back pay award *does* place the plaintiff in a worse position, because this evidence would not have been discovered absent the discrimination and the plaintiff would therefore still be employed.[224] This approach essentially legiti-

escape all liability by rummaging through an unlawfully discharged employee's background for flaws and then manufacturing a 'legitimate' reason for the discharge . . . ."), *vacated reh'g en banc granted,* No 91-7406, 1994 WL 481439 (11th Cir. Sept. 6, 1994).

221. *Cf. Wallace,* 968 F.2d at 1181 n.10 ("[E]ven if the doctrine of clean hands were applicable to this case, the effect of this equitable doctrine would be limited by the remedial goals of Title VII . . . .").

222. As discussed later, a "carefully tailored" remedy in the after-acquired evidence context accounts for the *discrimination* suffered, but does not provide an undeserved award for the loss of a *job* that the employee or applicant should not have enjoyed in the first place. *See supra* Part IV.

223. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). *Cf.* Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977) (finding that the constitutional right is sufficiently vindicated if the employee is not placed in a worse position).

224. *Wallace,* 968 F.2d at 1180-81.

mizes an employee's transgressions by rewarding those who are able to conceal such transgressions. The minority approach provides a bounty for those persons whose misconduct is discovered as a result of filing a discrimination suit rather than through some legitimate means. Regardless of how the misconduct is detected, employees should not benefit from their misdeeds so long as the employers are punished for their discriminatory practices. More specifically, although the employee should be entitled to *some* remedy for the actual discrimination, the issuance of back pay transcends the "make whole" and deterrent objectives of the statute.

IV. Redefining the Proper Role of After-Acquired Evidence

A sensible approach to the after-acquired evidence problem occupies a position somewhere in between the rigid causation analysis set forth in *Summers* and the altruistic formula embraced by courts adopting the minority approach. Whereas the draconian rule of *Summers* undermines Title VII's twin objectives, the overprotective minority rule errs by focusing exclusively on the *employer's* misdeeds and trivializing the often severe transgressions of the complaining party. In order to balance these competing considerations in the after-acquired evidence context, courts should provide a carefully tailored remedy for the discrimination suffered by an employee, but they should not compensate the employee for the loss of a job which was undeserved in the first place.

The amended liability and relief provisions of the Civil Rights Act of 1991 should provide guidance in striking this balance. To the extent that these provisions reflect Congress's intention to circumscribe a plaintiff's remedies in the face of competing interests, they are relevant to all situations that present similar competing interests, including those cases involving after-acquired evidence. The 1991 Act amended Title VII to impose liability on employers whenever impermissible motives play a role in employment decisions.[225] Nonetheless, in situations in which an employer is able to demonstrate that it would have come to the same decision even in the absence of an impermissible motive, Congress placed severe limitations on a complaining party's available relief.[226] Although these specific provisions of the 1991 Act were directed primarily at mixed-motive situations,[227] they may also have a useful application in after-acquired evidence cases because both situations require the balancing of competing interests. The mixed-motive model requires the balancing of the employee's

225. *See supra* note 18.

226. In this situation, Congress specifically precluded an award of damages, reinstatement, hiring, promotion, or back pay. 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. III 1991).

227. *See supra* notes 45-56 and accompanying text.

right to be free from discrimination against the employer's remaining freedom to base its employment decisions on any other permissible criteria.[228] The after-acquired evidence model has a analogous function: In these situations, a person's right to be free from invidious discrimination must be carefully weighed against the equitable notion that an unqualified or deceitful employee should not be granted a litigation windfall.[229]

A. Employer Liability

As under the minority approach, after-acquired evidence should never completely absolve an employer of liability.[230] If a plaintiff is able to demonstrate that an adverse employment decision was motivated by a prohibited discriminatory reason, the employer should be found liable regardless of any newly revealed evidence.[231] The majority approach avoids the question of liability by focusing exclusively on the question of available relief.[232] However, because the plaintiff is not considered to have suffered an injury in light of the defendant's after-acquired evidence, all available relief is precluded and liability ceases to be an issue.[233]

Because a plaintiff who is able to prove the existence of discrimination should receive some form of remedy, the blending of the liability and relief stages will no longer be appropriate. Under this Note's proposal, plaintiffs who make a sufficient showing at trial should always be entitled to a remedy for the proven discrimination. Employers may not, therefore, avoid a finding of liability by using after-acquired evidence to negate the plaintiff's claim of injury. At best,

228. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989).

229. It is a well-established principle that "'when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (quoting Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867)). Accordingly, courts should fashion relief such that complaining parties are compensated to the full extent of their injuries, and so that the compensation accorded a discrimination victim does not exceed the scope of the injury so as to provide a surplus remedy.

230. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1228 (3d Cir. 1994) ("After-acquired evidence, simply put, is not relevant in establishing liability under Title VII . . . .").

231. *Cf.* 42 U.S.C. § 2000e-2(m) (Supp. III 1991) ("an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice.*") (emphasis added).

232. *See* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) (after-acquired evidence relates only to question of "injury," and not to the issue of liability).

233. *See* Russell v. Microdyne Corp., 830 F. Supp. 305, 308 (E.D. Va. 1993) ("[N]o distinction exists between liability and remedy when no relief is available because of after-acquired evidence . . . .").

such evidence will affect only the nature and scope of the plaintiff's potential remedies, but the evidence cannot influence the initial question of whether liability exists. An employer's liability will always remain in issue regardless of any subsequent evidence of employee misconduct. As a consequence, an employer cannot be granted summary judgment solely on the basis of after-acquired evidence because a triable issue will remain as to whether the complaining party indeed suffered discrimination.[234]

B. Materiality Requirement

Courts should ensure that all after-acquired evidence is material before permitting it to have any effect on the litigation. The materiality inquiry has two parts: First, the employer must objectively demonstrate that the after-acquired evidence would have justified the employment decision. Second, the employer must show that it would indeed have made that decision had it known of the after-acquired evidence.[235] Moreover, because the after-acquired evidence serves as a "partial affirmative defense" under this approach, the employer should bear the burden of persuasion on the question of materiality.[236]

The materiality requirement, if properly administered by the courts, protects the legitimacy of the defense by ensuring that an employer *could* have and *would* have made the same adverse employ-

234. Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Because an employer's after-acquired evidence will affect only the quality of the plaintiff's remedies and not their ultimate availability, summary judgment will never be appropriate solely on the basis of after-acquired evidence. This approach does not foreclose summary judgment on other grounds (e.g., when the plaintiff cannot make out a prima facie case of discrimination), or partial summary judgment on the plaintiff's claims for prospective remedies such as front pay, reinstatement, or promotion. *See infra* text accompanying notes 235-42.

235. *See* O'Driscoll v. Hercules, Inc., 12 F.3d 176 (10th Cir.), *petition for cert. filed*, 62 U.S.L.W. 3757 (U.S. Apr. 1, 1994) (No. 93-1728). This second prong of the materiality requirement is a purely subjective test, focusing on how a specific employer would react in this hypothetical scenario. *See* Brief for Respondent at 18, McKennon v. Nashville Banner Publishing Co., No. 93-1543 (U.S. Sept. 8, 1994) (arguing that one aspect of materiality is that "the employer must prove subjectively that it would have terminated the employee had the misconduct been discovered").

236. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 246 (1989) (observing that a mixed-motive argument is most appropriately deemed an affirmative defense because "the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another."). *See also* Follette, *supra* note 12, at 669 (arguing that the burden of proof rests with defendant to show the materiality of after-acquired evidence once plaintiff has made out a prima facie case of discrimination).

ment decision.[237] Consistent with the minority approach, it prevents an employer "from combing a discharged employee's record for evidence of any and all misrepresentations, no matter how minor or trivial, in an effort to avoid legal responsibility for an otherwise impermissible discharge."[238] Additionally, because summary judgment will no longer be appropriate on the question of liability, the factual question of materiality must be determined not on the basis of self-serving affidavits, but by a properly instructed jury.[239]

C. Prospective Remedies and Back Pay

Consistent with both the majority and minority views, a plaintiff's prospective remedies of reinstatement, promotion, or front pay should be precluded where the employer is able to proffer material evidence of the plaintiff's misconduct.[240] If an employer's after-acquired evidence provides a legitimate motive for termination, an award of reinstatement or front pay would go beyond the remedial purpose of the statute and "would unduly trammel [an employer's] freedom to lawfully discharge employees."[241] Because Title VII does not limit the other permissible "qualities and characteristics that employers may take into account in making employment decisions,"[242] the statute's explicit protections would be exceeded if courts were to grant prospective relief to employees who would nevertheless have been terminated in light of their misconduct.

Unlike the minority approach, plaintiffs should not receive a back pay award if an employer submits material evidence of the plaintiff's fraud or misconduct, whether or not the evidence was discovered after-the-fact. Eliminating the back pay award is necessary to prevent dishonest employees from obtaining a litigation windfall. Moreover, because the employee was not actually entitled to the job at the moment the adverse employment decision was made, a back pay award

237. *See* Reed v. AMAX Coal Co., 971 F.2d 1295, 1298 (7th Cir. 1992). In its brief to the Supreme Court in *Nashville Banner*, the employer argued that this type of test would comport with the objective and subjective standards of proof required in sexual harassment cases by Harris v. Forklift Sys., 114 S. Ct. 367 (1993). Brief for Respondent at 18 n.28, McKennon v. Nashville Banner Publishing Co., No. 93-1543 (U.S. Sept. 8, 1994).

238. Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 414 (6th Cir. 1992).

239. The Civil Rights Act of 1991 gives plaintiffs in Title VII actions the right to a jury trial. 42 U.S.C. § 1981a(c) (Supp. III 1991). This provision applies to all cases that arose after the effective date of the statute. *See* Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994) (holding that the 1991 Act does not apply retroactively).

240. *See, e.g.*, Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181 (11th Cir. 1992) (holding that reinstatement and front pay are inappropriate remedies in light of material after-acquired evidence), *vacated and reh'g en banc granted*, No. 91-7406, 1994 WL 481439 (11th Cir. Sept. 6, 1994).

241. *Id.* at 1182.

242. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989).

goes beyond the "make whole" purpose of Title VII and actually places the employee in a better position. A back pay award is designed to place the employee in the *same* position he or she would have occupied but for the illegal discrimination.[243] Thus, to the extent that the employee's pre-discrimination position was either attained or preserved through illicit means, it makes little sense to return the employee to the status quo ante by awarding back pay. That the employee's misdeeds would not have been discovered but for the employer's alleged discrimination should not matter, provided both that the employer is punished for its discriminatory practices and that the employee is compensated for the actual discrimination suffered.[244]

D. Redressing Discrimination

Although a back pay award in after-acquired evidence cases would go beyond the remedial purpose of Title VII, an employee who proves discrimination should be entitled to a remedy for the harm caused by the employer's illegal conduct. Because it seeks to balance similar competing interests, section 107(b) of the Civil Rights Act of 1991 provides a valuable starting point for determining a plaintiff's remedy in this situation.[245] However, because section 107(b)'s remedial framework does not go far enough in providing adequate redress for the harm caused by discrimination, it does not represent the perfect model.

Importantly, section 107(b) does not allow for recovery of compensatory or punitive damages to mixed-motive plaintiffs.[246] Because these remedies are necessary to make a victim of discrimination "whole," they are an integral part of the revised Title VII framework

243. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975).

244. This is consistent with the Supreme Court's pronouncement that "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Abermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). As noted in Part IV.D., *infra*, an employee will be "made whole" by an award of compensatory and, if appropriate, punitive damages for the discrimination suffered. The availability of these awards (and reasonable attorney's fees) will also serve to deter employers from discriminatory employment practices.

245. Section 107(b) provides that when an individual makes out a prima facie case of discrimination and the employer demonstrates that it would have taken the same action in the absence of the impermissible motivating factor:

> [T]he court— (i) may grant declaratory relief, injunctive relief . . . and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section [107(a)]; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

§ 107(b), 105 Stat. 1071, 1075-76 (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. III 1991)).

246. *See id.*

and should not be denied arbitrarily to particular plaintiffs, so long as discriminatory conduct is proven.[247] However, because "a complaining party [may] receive relief *only for the harm that actually results* from the illegal discriminatory conduct,"[248] section 107(b) is correct in precluding an award of back pay to successful plaintiffs in mixed-motive cases. It is also correct in authorizing courts to grant other appropriate relief, including declaratory and injunctive relief, as well as attorney's fees and costs.[249]

The remedial framework found in section 107(b), combined with a provision for compensatory and punitive damages, is an appropriate solution to the problem of after-acquired evidence. This approach would take into consideration the misdeeds of the employee, and it would ensure that victims of discrimination obtain redress only for the injury actually attributable to the discrimination.[250] Specifically, a remedy would be provided to compensate for the discriminatory conduct of employers, yet employees who defraud their employers would be prevented from obtaining an undeserved windfall.

The availability of compensatory and punitive damages in after-acquired evidence cases is essential in order to attain the deterrent and remedial goals of Title VII.[251] Although back pay should be denied for the simple reason that it represents economic compensation for a job to which the employee was not entitled, compensatory and punitive damages specifically focus on the discrimination suffered and should be available to plaintiffs who prove employer liability. As mentioned, the 1991 Act provides these discrimination-related remedies in disparate treatment cases that do not involve mixed motives.[252] A victorious plaintiff may now be awarded compensatory damages for

247. *See* Belton, *supra* note 21, at 943 (arguing that the denial of compensatory and punitive damages undercuts the dual objectives of Title VII).

248. H.R. REP. No. 40, 102d Cong., 1st Sess., tit. II, at 19 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 712 (emphasis added).

249. § 107(b), 105 Stat. at 1075-76 (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. III 1991)).

250. This enforcement scheme is also consistent with the second of Title VII's dual objectives — deterring employers from engaging in discriminatory employment practices. In the mixed-motive context, Congress determined that employers would be sufficiently deterred by the prospect of costly litigation, a possible injunction, and the ignominy of being branded as an employer that discriminates against its employees. If this deterrent function is realized in the mixed-motive context, in which the employer has contemporaneous knowledge of both permissible and impermissible reasons to discharge the employee, then it should function at least as well in the after-acquired evidence context, in which the employer does not know until much later of a legitimate reason for discharging the employee.

251. To deny such relief to a plaintiff who is able to prove liability would, in the words of one commentator, give the plaintiff "at best, a pyrrhic victory." Belton *supra*, note 21, at 943.

252. *See supra* note 21.

the pain and suffering, inconvenience, and mental anguish that result from an employer's intentional discrimination.[253] These specific injuries result directly from an employer's discriminatory conduct and are separate and distinct from the *economic* injury ordinarily caused by the loss of a job or promotion.[254] Consequently, these injuries are not in any way mitigated by the employer's subsequent discovery of the plaintiff's misconduct and damages should not, therefore, be precluded if otherwise deserved.[255] Similarly, the availability of a punitive damage award should not be determined according to the complaining employee's conduct: Because such an award is designed to punish and deter, courts must look exclusively to the acts of the *employer*. An award of punitive damages is proper under Title VII when an employer engages in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[256] This standard is unaffected by the subsequent discovery of the employee's own misconduct. Thus, when an employer's intentional discrimination rises to the level of "malice" or "reckless indifference," punitive damages should be awarded without regard to the employer's after-acquired evidence.[257]

Conclusion

The federal courts' conflicting treatment of after-acquired evidence in disparate treatment cases stems from the inability of these courts to balance the countervailing interests at stake. In their steadfast application of the inflexible *Summers* rule, the majority of courts cut off even potentially meritorious claims and thereby undermine the important objectives of the antidiscrimination statutes. By contrast, courts in the minority go too far in effectuating these goals

253. 42 U.S.C. § 1981a (Supp. III 1991).

254. One court described the non-economic injury which results from discrimination as "more than the loss of just a wage. It means the loss of a sense of achievement and the loss of a chance to learn. Discrimination is a vicious act. It may destroy hope and any trace of self-respect. That, and not the loss of pay, is perhaps the injury which is felt the most and the one which is the greatest." Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832, 834 (W.D. Tex. 1973), *rev'd on other grounds*, 488 F.2d 691 (5th. Cir. 1974) (finding error in district court's finding of facts).

255. *See* Zemelman, *supra* note 103, at 208 (compensatory damages "counteract harms that do not decrease simply because the victim misrepresented credentials or engaged in other misconduct.").

256. 42 U.S.C. § 1981a(b)(1) (Supp. III 1991).

257. The EEOC enforcement guidance issued July 14, 1992 is in accord with this notion. "[I]f the employer's sole motivation was discriminatory and it acted with 'malice or with reckless indifference' to the victim's rights, proof of an after-the-fact justification would not shield an employer from an order requiring it to pay punitive damages." Equal Employment Opportunity Comm'n, Revised Enforcement Guidance No.915-002, 1992 WL 189088, at *9 (July 14, 1992).

— their approach transcends the remedial purpose of Title VII by providing a windfall to employees who have no legal entitlement to their positions of employment.

A more balanced approach to the after-acquired evidence problem evaluates the underlying policy of Title VII in light of the employer's right to insist upon integrity in the work force and the equitable notion that a deceitful employee should not receive a windfall. The courts should therefore adopt an approach that provides a remedy for the *discrimination* suffered by an individual, but that does not confer an undeserved bounty for the loss of a *job* to which the individual had no legal right. Such an approach will place the complaining individuals in the same positions they would have occupied but for the illegal discrimination, but it will also guard against placing these individuals in a *better* position. This equilibrium can be attained by precluding the job-related economic relief available to a Title VII plaintiff, yet still awarding the forms of relief that are inexorably linked to the injuries which flow from discrimination — namely, declaratory relief, compensatory and punitive damages, and an award of attorney's fees for the pursuit of the claim. This proposed approach will ensure that the effect of an employee's dishonesty is not overlooked or trivialized. At the same time, however, it upholds the policy behind Title VII by recognizing that an employee who is subjected to a discriminatory employment practice has indeed suffered an injury regardless of whether other legitimate reasons for the employer's conduct might have existed.